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In the Supreme Court of the United States

October Term, 1930.

WILLIAM H. MECOM, ADMINISTRATOR OF THE ESTATE OF ARCHIE LEE SMITH, DECEASED, *Petitioner,*

vs.

FITZSIMMONS DRILLING COMPANY, INCORPORATED, A CORPORATION, AND ATLANTIC OIL PRODUCING COMPANY, A CORPORATION, *Respondents.*

PETITION FOR WRIT OF *CERTIORARI* TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

ROY F. FORD,
S. J. MONTGOMERY,
Tulsa, Oklahoma,
Counsel for Petitioner.

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PETITION FOR WRIT OF *CERTIORARI.*

To the Honorable CHARLES EVANS HUGHES, *Chief Justice, and the Associate Justices of the Supreme Court of the United States of America:*

Your petitioner, William H. Mecom, as administrator of the estate of Archie Lee Smith, deceased, respectfully files and submits this as his petition for a writ of *certiorari* to review a decision and judgment of the United States Circuit Court of Appeals for the Tenth Circuit.

The Circuit Court of Appeals on January 20, 1931, by a divided court, affirmed a decision and judgment of the

District Court of the United States for the Western District of Oklahoma in favor of respondents herein and against petitioner. (R. 54-62, incl.) (Opinion not yet officially reported.)

Petition for a rehearing was later filed (R. 63-99, incl.) and was denied on February 12, 1931. The mandate has been stayed by proper order (R. 101) and the cause is now filed and docketed herein for decision.

Statement of Case.

Petitioner, as plaintiff, originally filed this action in a state court, to-wit, the District Court of Oklahoma County, State of Oklahoma, whereby in his amended petition (R. 2-8, incl.) he sought to recover damages for the wrongful death of one Archie Lee Smith. Two causes of action are set out in the amended petition, one for damages for the wrongful death of the deceased, which, under the statutes of Oklahoma, is for the exclusive benefit of the widow and children of said deceased; the other cause of action was for damages for pain and suffering which the deceased underwent from the time he was injured until he died, and for the benefit of the estate of said deceased.

Within the time allowed by law the respondents herein by petition (R. 8-25, incl.) removed said cause to the federal court on the ground of diversity of citizenship. It was admitted by the record that at the time of the filing of the amended petition, petitioner was a resident and citizen of the State of Louisiana; that the respondent, Fitzsimmons Drilling Company, Incorporated, a corporation,

was a resident and citizen of the same state as petitioner, to-wit, the State of Louisiana, while respondent Atlantic Oil Producing Company, was a resident and citizen of the State of Delaware. The widow and children of the deceased were residents and citizens of the State of Oklahoma.

Petitioner filed a motion to remand the case to the state court (R. 25-27, incl.) on the theory that no diversity of citizenship existed, as petitioner and one of the respondents were residents and citizens of the same state, to-wit, the State of Louisiana, while the respondents by their petition for removal contended that petitioner's citizenship and residence should be disregarded on the question of removability of the case, and that only the citizenship and residence of the next of kin or beneficiaries should be taken into account.

The District Court of the United States refused to remand the case to the state court (R. 33-34). Upon a trial in that court a judgment was rendered in favor of respondents and against petitioner (R. 40-41). An appeal was prosecuted to the Circuit Court of Appeals who affirmed the trial court.

Single Question Presented by Record.

The sole question presented in this case is the jurisdiction of the trial court to do any act in the case, except to have remanded it to the state court on proper application.

The Circuit Court of Appeals in affirming the judgment of the trial court held, in substance:

(1) "That where an administrator prosecutes an action for damages for wrongful death under the statutes of Oklahoma for the use and benefit of the next of kin of said deceased, that the administrator is a mere formal or nominal party and the citizenship and residence of the administrator should be disregarded, and only the residence and citizenship of the beneficiaries, or next of kin, should be taken into account in determining the jurisdiction of a United States District Court.

(2) "That although the probate statutes of the State of Oklahoma authorize the appointment of a non-resident administrator, that where several suits have been filed and dismissed and the purpose of having a foreign administrator appointed is to defeat the jurisdiction of a United States District Court and keep a case from being removed from the state to the federal court on the ground of diversity of citizenship, that the court would not permit this to be done, to avoid a removal."

The reason relied on for the allowance of this writ is the hopeless conflict of decisions in federal appellate courts.

The decision of the Circuit Court of Appeals in this case conflicts with the theory of several decisions of this court, and with at least two decisions of the Circuit Court of Appeals for the Sixth Circuit, as well as constructions placed upon the death statutes of Oklahoma by the highest court of that state.

The question of jurisdiction involved is most important, as we do not see how any United States District Court could pass upon a question of its own jurisdiction where an administrator is a party to a suit, and his residence and citizenship is different than that of the beneficiaries or next

of kin, without violating the rule laid down in at least some one of the conflicting opinions.

The death statutes of the State of Oklahoma are identical with the death statutes of the State of Indiana, and the Circuit Court of Appeals for the Sixth Circuit has construed the same death statutes in exactly the opposite way from the opinion of the Circuit Court of Appeals in this case, in the case of *Cincinnati, H. & D. Ry. Co.* v. *Thiebaud*, 114 F. 918.

Again the statutes of Oklahoma with reference to parties also provide in substance that an executor, administrator, guardian or trustee of an express trust may sue in his own name without joining the party for whose benefit the suit is prosecuted. The Circuit Court of Appeals failed and neglected to consider or construe this statute in its opinion, although it was called to its attention and although the State of Michigan has the identical statutes, which are construed as we contend for in this case, by the Circuit Court of Appeals for the Sixth Circuit in the case of *City of Detroit, Michigan*, v. *Blanchfield*, 13 F. (2nd) 13.

The State of Texas also has substantially the same statute on parties, which was construed by the Supreme Court of the United States as we contend for, in the case of *Mexican Central Ry. Co.* v. *Eckman, Gdn.*, 187 U. S. 429, 23 Sup. Ct. Rep. 211, 47 L. ed. 245.

The Supreme Court of Oklahoma, the highest court of the state, in the case of *Aetna Casualty & Surety Co.* v. *Young*, 107 Okl. 151, 231 Pac. 261, has substantially held that an administrator is not a formal or nominal party in a

suit brought for damages for wrongful death, because it is the administrator's duty to collect the money on the death claim, distribute the same to the proper parties who are entitled to it under the statute, and if he fails so to do that he is liable on his official bond.

The authorities cited in the majority opinion are not in point and do not support the conclusions therein reached, as will be pointed out in our brief in support of this petition.

The dissenting opinion by Judge COTTERAL in the case at bar follows the correct rules, and is supported by the authorities above mentioned, as well as others, and will be referred to in our brief.

This court at this time, and in this case, should settle once and for all time to come the hopeless conflict in the federal appellate court decisions, and answer the following question:

In determining the jurisdiction of a United States District Court on the ground of diversity of citizenship, whose citizenship and residence should govern where an administrator is a party to the suit—the administrator's residence and citizenship, or the citizenship and residence of the beneficiaries or next of kin?

A correct answer to the above question will necessarily dispose of both propositions discussed in the majority opinion hereinbefore referred to.

Assignment of Error.

Jurisdiction was wrongfully and unlawfully assumed and retained by the federal court in this case, in violation of the United States Judicial Code, and all of the federal appellate court decisions and opinions that we have been able to locate after an exhaustive search.

Reference to Record.

In this petition and brief in support thereof, we have attempted to comply with the rules of the court by making them as short and concise as possible, and will call to the attention of the court only a small portion of the large number of cases on the subject; however, we have collected substantially all of the cases digested on the proposition in our petition for rehearing (R. 63-99, incl.), which is set out in the certified copy of the record of the Circuit Court of Appeals for the Tenth Circuit filed herewith.

Wherefore, your petitioner respectfully prays that this petition be sustained and granted, and that a writ of *certiorari* issue in said cause, as provided by law, to the end that said cause may be reviewed and determined by this court; that upon final hearing the judgment of the Circuit Court of Appeals be reversed, with instructions to such appellate court to cause said cause to be remanded to the state court from whence it was wrongfully removed to the federal court, and petitioner prays for all other proper relief.

S. J. Montgomery,
Roy F. Ford,
Tulsa, Oklahoma,
Counsel for Petitioner.

VERIFICATION AND CERTIFICATE OF COUNSEL.

State of Oklahoma, County of Tulsa—ss.

Roy F. Ford and S. J. Montgomery, each for himself; upon oath say: That they are attorneys for petitioner in the foregoing petition; that they have read the said petition and have personal knowledge of the matters and things therein set forth, and believe the same to be true.

Affiants further state that the said petition for writ of *certiorari* is prepared and filed in the utmost good faith, believing that the same is meritorious, and that said petition is not prepared and presented in order to be vexatious or to delay the final opinion and judgment in the case.

ROY F. FORD,
S. J. MONTGOMERY.

Subscribed and sworn to before me this 2d day of March, A. D. 1931.

CHARLOTTE F. BASSE,
Notary Public.

(Seal)

My commission expires November 29, 1931.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI.*

Two points are decided in the majority opinion in this case, which are referred to in the foregoing petition. We will answer these points in their order.

POINT I.

Sections 824 and 825 of the Compiled Oklahoma Statutes for the year 1921, on death, are in words and figures as follows, to-wit:

> "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages must inure to the exclusive benefit of the widow and children, if any, or next of kin; to be distributed in the same manner as personal property of the deceased."
>
> "In all cases where the residence of the party whose death has been caused as set forth in the preceding section, is at the time of his death in any other state or territory, or when, being a resident of this state, no personal representative is or has been appointed, the action provided in the said section may be brought by the widow, or where there is no widow, by the next of kin of such deceased."

The majority opinion of the Circuit Court of Appeals holds that under these two statutes the administrator is a

mere nominal or formal party, and that his residence and citizenship should be disregarded in determining the jurisdiction of a United States District Court for diverse citizenship, and that only the residence and citizenship of the next of kin or beneficiaries should be taken into account.

The State of Indiana has identically the same death statutes as Oklahoma, and the Circuit Court of Appeals for the Sixth Circuit in construing the Indiana statutes construe them in exactly the opposite way to the Circuit Court of Appeals in the case at bar.

The case to which we refer is the case of *Cincinnati, H. & D. Ry. Co.* v. *Thiebaud,* 114 Fed. 819. The fourth paragraph of the syllabus of this latter case reads as follows:

> "The statute of Indiana (Burns' Rev. St. 1894, Par. 285), gives an administrator a right of action for the wrongful death of his intestate if the deceased, had he lived, might have maintained an action for an injury for the same act or omission, and provides that the damages recovered shall inure to 'the exclusive benefit of the widow and children, if any, or, next of kin, to be distributed in the same manner as personal property of the deceased.' *Held, that an administrator in such an action sues as trustee, and not as a merely formal party, without interest, being vested by the statute with the legal title to the cause of action, and charged in his official capacity with the care and distribution of the amount recovered, and that his citizenship, and not that of the beneficiaries, must be considered in determining whether a federal court has jurisdiction of the action.*"

Ohio has substantially the same death statute as Indiana and Oklahoma, and it is construed the same as the In-

diana statute in the case of *Popp* v. *Cincinnati, H. & D. Ry. Co.*, 96 Fed. 465.

The highest state court of the State of Oklahoma in construing the death statutes of the state, which are the ones above set out, shows, we think, that an administrator is not merely a nominal or formal party, but is the real party in interest.

The Supreme Court of Oklahoma in the case of *Aetna Casualty & Surety Co.* v. *Young*, 107 Okl. 151, 231 Pac. 261, lays down the following rules:

> "Under section 824, Compiled Oklahoma Statutes 1921, it is the duty of the administrator of the estate of a deceased person whose death was produced by the wrongful act of another to maintain a suit against such tort feasor when necessary to recover for the benefit of the next of kin the damages which they have thereby sustained, and to collect, receive, and distribute such moneys in proper proportion to the *cestui que trusts*. This section does not create a new office, but adds new duties to an old office, and for a dereliction in the performance of the duties thereof the administrator and the sureties on his official bond as administrator are liable."

Section 211, Compiled Oklahoma Statutes 1921, on parties plaintiff, provides as follows:

> "An executor, administrator, guardian, trustee of an express trust, a person with whom, or in whose name, a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued

in such name as is authorized by law, and official bonds may be sued upon in the same way."

This section was called to the attention of the Circuit Court of Appeals, but the majority opinion fails to take any notice whatever of it, although it is mentioned in the dissenting opinion of Judge COTTERAL.

The State of Michigan has this identical statute which was construed by the Circuit Court of Appeals for the Sixth Circuit in the case of *City of Detroit, Michigan*, v. *Blanchfield*, 13 Fed. (2d) 13, wherein the court said:

> "Under Judicature Act, Mich. (Pub. Acts 1915, No. 314), c. 12, Sec. 12, providing that a guardian may maintain an action in his own name without joining his ward, for whose benefit it is brought, it is the citizenship of the guardian and not of the ward on which the jurisdiction of a federal court depends."

The Supreme Court of the United States has directly passed on this proposition also in the case of *Mexican Central Railway Co.* v. *Eckman*, 187 U. S. 429, 23 S. Ct. Rep. 211, wherein the court said:

> "The guardian, and not the ward, is the party plaintiff, so far as federal jurisdiction invoked solely on the ground of diverse citizenship is concerned, where the guardian has, under the state laws, the right to bring the suit in his own name."

Other late cases supporting our position on this question are:

Patch v. *Wabash Railway Co.*, 207 U. S. 277;
Memphis Street Ry. Co. v. *Moore*, 243 U. S. 299.

Cases Cited in Majority Opinion Not in Point, and Do Not Support Conclusion Reached.

The majority opinion cites the cases of *Stewart* v. *Baltimore & Ohio Ry. Co.*, 168 U. S. 445; *Maryland* v. *Baldwin*, 112 U. S. 490, and a number of other cases as supporting the conclusions reached under the first proposition; however, a close examination of these cases shows that none of them are in point, as they are all cases where a state or some officer thereof, or a United States marshal or sheriff brings a suit for the benefit of some third person, and in that kind of a case it is held that the residence and citizenship of the party for whose benefit the suit is brought governs in determining the jurisdiction of a federal court on the ground of diversity of citizenship, and the name of the mere nominal or formal party will be disregarded. That is not the situation in this case, as has been clearly pointed out by the Supreme Court of the United States in at least two opinions, the first of which is *New Orleans* v. *Gaines*, 138 U. S. 595, 606, *sub. nom. New Orleans* v. *Whitney*, 34 L. ed. 1102, 1106, 11 Sup. Ct. Rep. 428, 431. Mr. Justice BRADLEY clearly points out the distinction between the cases cited in the opinion in the case at bar and the principle we herein contend for in the following language:

> "The most that can be said is that the subrogated creditor, by operation of law, represents the person to whose right he is subrogated. *But we have repeatedly held that representatives may stand upon their own citizenship in the federal courts irrespectively of the citizenship of the persons whom they represent—such as executors, administrators, guardians, trustees, receiv-*

ers, etc. The evil which the law was intended to obviate was the voluntary creation of federal jurisdiction by simulated assignments. But assignments by operation of law, creating legal representatives, are not within the mischief or reason of the law. Persons subrogated to the rights of others by the rules of equity are within this principle.

"When, however, the state or the governor of a state is a mere figurehead, or nominal party, in a suit on a sheriff's or administrator's bond, the rule does not apply. There the real party in interest is taken into account on the question of citizenship, Spear, Fed. Jud. 150, 152, and cases there cited; *Coal Co.* v. *Blatchford*, 11 Wall. 172; *Rice* v. *Houston*, 13 Wall. 66; *Browne* v. *Strode*, 5 Cranch. 303; *Irvine* v. *Lowry*, 14 Pet. 293; *McNutt* v. *Bland*, 2 How. 9; *Huff* v. *Hutchinson*, 14 How. 586."

This case is cited with approval by Mr. Chief Justice FULLER in the case of *Mexican Central R. Co.* v. *Eckman*, 187 U. S. 429, 23 Sup. Ct. Rep. 211. This case was decided on January 5, 1903, and is later in point of time than any of the cases cited under the first proposition by the majority opinion.

In the course of the opinion Chief Justice FULLER said:

"It is true that where a state or one of its officials is a mere figurehead, a nominal party, to a suit on a sheriff's or administrator's bond, or an action is instituted in the name of a United States marshal on an attachment bond, the real party in interest is taken into account on the question of citizenship, notwithstanding the general rule that the jurisdiction of the federal court depends, not on the relative situation of the parties concerned in interest, but on the relative situa-

tion of the parties named in the record. But those are instances of merely formal parties, whose names are used from necessity, and, as said in *New Orleans* v. *Gaines*, by Mr. Justice BRADLEY, 'We have repeatedly held that representatives may stand upon their own citizenship in the federal courts irrespective of the citizenship of the persons whom they represent—such as executors, administrators, guardians, trustees, receivers, etc. The evil which the law was intended to obviate was the voluntary creation of federal jurisdiction by simulated assignments. But assignments by operation of law, creating legal representatives, are not within the mischief or reason of the law'."

The distinction in the two classes of cases, perhaps, is best pointed out by Circuit Judge ROGERS in a later case, decided in 1920, by the Circuit Court of Appeals for the Second Circuit, wherein the two classes of cases are reviewed for more than the last hundred years. This is the case of *New York Evening Post Co.* v. *Chaloner*, 265 Fed. 204.

POINT II.

In discussing the second point or proposition, the majority opinion entirely overlooks the probate code of the State of Oklahoma and the legal rights granted thereunder, and the code is only incidentally mentioned in the majority opinion, although it is considered in the dissenting opinion by Judge COTTERAL, and the majority opinion, without citation of any authorities in point, holds that because the widow and her counsel filed four different lawsuits, which were removed to the federal court and later dismissed, and

then had a foreign administrator appointed with the motive, intent and purpose of defeating a removal of the case from the state to the federal court on the ground of diversity of citizenship, that it would not permit the jurisdiction of the federal court to be defeated on removal.

Probate Code of Oklahoma.

It will be necessary to examine certain sections of the probate code of the State of Oklahoma, Compiled Oklahoma Statutes, 1921.

Section 1079 defines the jurisdiction of the probate or County Court.

Section 1141 enumerates the parties entitled to be appointed as administrator of a deceased person's estate, and makes no distinction between resident or non-resident, but provides that any person legally competent may be appointed.

Section 1146 sets out the requisites of the petition.

Section 1153 provides for a waiver of a person entitled to appointment in favor of some other person.

Section 1159 sets out what a non-resident administrator must do before entering upon the performance of his duties, and reads as follows:

> "Every executor, administrator, or guardian, appointed in, but residing out of the state, shall, before entering upon the duties of his trust, in writing, appoint an agent residing in the county where he is appointed, and shall by such writing stipulate and agree that the service of any legal process against him as such executor, administrator or guardian if made on

said agent shall be of the same legal effect as if made on himself personally within the state. Such writing shall give the proper address of such agent and shall be filed in the office of the judge of the County Court where such appointment is made."

Sections 1188 and 1189 show when a second administrator may be appointed when the first has become disqualified or has resigned.

Section 1197 defines the powers and duties of an executor or administrator.

All of the probate statutes were complied with to the letter in having petitioner herein appointed administrator of the estate by the county judge of Pawnee County, Oklahoma, the court having original jurisdiction to make the appointment. The appointment is regular on its face and cannot be collaterally attacked. The judgment appointing the administrator, petitioner in this case, is entitled to as much respect and consideration as any judgment ever rendered by any court.

Respondents attempted to attack collaterally the appointment by their petition for removal, and the evidence introduced in support thereof, which is prohibited by the Supreme Court of Oklahoma in two cases as follows:

Wolfe v. *Gills, et al.*, 96 Okl. 6, 219 Pac. 350;

In re Green's Estate, Green v. *Yearger*, 251 Pac. 1008.

The following federal courts have also held that a judgment and order appointing an administrator cannot be collaterally attacked in the federal court:

McGehee, et al., v. *McCarley*, 91 Fed. 462;
Northwestern Mutual Life Insurance Co. v. *Johnson*, 275 Fed. 757;
Smith v. *Jennings*, 238 Fed. 48.

Having an administrator or guardian appointed for the purpose of giving a federal court jurisdiction or avoiding it where it is authorized by the state law, does not constitute a fraud on the federal court.

—*City of Detroit, Michigan*, v. *Blanchfield*, 13 Fed. (2d) 13.

The joining of parties to a suit in the state court for the purpose of defeating a removal to the federal court is not fraudulent or illegal, whatever the motive may be, if it is authorized by the state law.

—*Illinois Central Ry. Co.* v. *Shegog*, 215 U. S. 308;
Chicago, Baltimore & Quincy Ry. Co. v. *Willard*, 220 U. S. 413.

In 1 C. J. 971, Par. 66, under title of actions, it is said:

"If plaintiff shows a good and valid cause of action his motive in bringing the action is entirely immaterial, and cannot be inquired into; and it is no defense that he was actuated by improper motives, or malice, or a desire for revenge. These rules apply in equity as well as at law if the action is to enforce a clear equitable right."

The Circuit Court of Appeals for the First Circuit, in the case of *Johnson* v. *King-Richardson Co.*, 36 Fed. (2d) 675, approves the foregoing statement, and says:

"Where suitor is entitled to relief in respect to matter concerning which he sues, his motives are immaterial, and legal pursuit of his rights, no matter what his motive in bringing action, cannot be deemed either illegal or inequitable, and he may always insist upon his strict rights and demand their enforcement."

A late case decided by this court, that of *Black & White Taxicab & Transfer Co.* v. *Brown & Yellow Taxicab & Transfer Co.*, 48 Sup. Ct. Rep. 404, 276 U. S. 518, is more nearly in point than any that can be found which determines this proposition, in our opinion. The first and second paragraphs of the syllabus in this case are as follows:

"'Where, in action by taxicab company to prevent interference with carrying out of contract with railroad, brought in federal court, in Kentucky, requisite diversity of citizenship existed, and controversy was real and substantial, court, in determining jurisdiction, will not inquire into motives of plaintiff in reincorporating in Tennessee for purpose of suing in federal court.

"Co-operation between railroad and taxicab company to have rights of parties to contract between them determined by federal court by having latter reincorporate in another state for purpose of suing in federal court, *held* not improper or 'collusive,' within meaning of Judicial Code, Sec. 37 (28 U. S. C. A., Sec. 80)."

Can a litigant by exercising a right given him under a state law be guilty of a fraud on a federal court, although the litigant exercises such right with the purpose and intent of avoiding the jurisdiction of the federal court?

We think this question must be answered in the negative.

Conclusion.

The conflict of original jurisdiction between a state and federal court is always an important question, and this is especially true where the estate of a deceased person may become involved. Everyone has to die sometime, and as soon as death occurs the estate may become involved in litigation, either in a state or federal court.

Until the Circuit Court of Appeals handed down the opinion in this case the law was clear on the question of original jurisdiction between a state and federal court on removal where an administrator was a party to the suit, but is now in hopeless conflict.

There has not been a recent opinion by the Supreme Court of the United States on this question, and we believe that on account of the uncertainty and diversity of opinion between the federal appellate courts on the question of jurisdiction and the importance of the matter involved, which may arise in any one of the United States District Courts at any time, that this court should grant this petition, decide the case on its merits, and forever settle the question.

Respectfully submitted,

ROY F. FORD,
S. J. MONTGOMERY,
Tulsa, Oklahoma,
Counsel for Petitioner.